IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

EDWARD J. HARDIN, as Mayor of Tazewell, Tennessee, and
JAMES B. DeBUSK, as Mayor of New Tazewell, Tennessee, - - - - - - Petitioners,

versus No. 40

KENTUCKY UTILITIES COMPANY, - Respondent.

POWELL VALLEY ELECTRIC COOPERATIVE, - - - - - - - - - - Petitioner,

versus No. 50

KENTUCKY UTILITIES COMPANY, - Respondent.

TENNESSEE VALLEY AUTHORITY, - Petitioner,

versus No. 51

KENTUCKY UTILITIES COMPANY, - Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONERS, EDWARD J. HARDIN, AS MAYOR OF TAZEWELL, TENNESSEE, AND JAMES B. DeBUSK, AS MAYOR OF NEW TAZEWELL, TENNESSEE.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	2– 3
Statement	3–10
Summary of Argument	10–12
Argument:	
I. The TVA Financing Act Does Not Destroy the Rights of the Public in an Area Where Both a TVA Distributor and an Investor Company Were Selling Power on July 1, 1957	13–29
II. The TVA Financing Act Gives KU no Right to Be Free of Competition in Areas Where There Was Such Competition on July 1, 1957	30–33
III. The TVA Board Has an Obligation to Make Legal Interpretations of the TVA Act, and to Make Findings of Fact Based Upon Those Interpretations Which, If Supported by Substantial Evidence, Have the Binding Effect of Law	33–45
Conclusion	46
Appendix A	47–50

CITATIONS.

Federal Cases:

PAGE

Alabama Power Co. v. *Ickes*, 302 U. S. 464 (1938) . . 11, 31

Atlantic Refining Co. v. *Federal Trade Commission*, 381 U. S. 357 (1965) 34

Consolo v. *Federal Maritime Commission*, 383 U. S. 607 (1966) 12, 41

Corn Products Refining Co. v. *Federal Trade Commission*, 324 U. S. 726 (1945) 44–45

Federal Power Commission v. *Union Electric Company*, 381 U. S. 90 (1965) 34

Federal Trade Commission v. *Borden Co.*, 383 U. S. 637 (1966) 34

Illinois Central Railroad Co. v. *Norfolk & Western Railroad Co.*, ____ U. S. ____; 17 L. Ed. 2d 162 (1966) 42

Kansas City Power & Light Co. v. *McKay*, 225 F. 2d 924 (D.C. Cir. 1955), cert. den. 350 U. S. 884 (1955) 11, 31

Kimball Laundry Co. v. *United States*, 338 U. S. 1 (1949) 26

Knoxville Water Co. v. *Knoxville*, 200 U. S. 22 (1906) 30

Massachusetts Trustees v. *United States*, 377 U. S. 235 (1964) 34–35

Morgan v. *Tennessee Valley Authority*, 115 F. 2d 990 (6th Cir. 1940) cert. den. 312 U. S. 701 (1941) 35–36

Northern States Power Co. v. *REA*, 373 F. 2d 686 (8th Cir. 1967), cert. den. 387 U. S. 945 (1967) . . 32

REA v. *Central Louisiana Electric Co., Inc.*, 354 F. 2d 859 (5th Cir. 1966) cert. den. 385 U. S. 815 (1966) 31

Richmond v. *Southern Bell Telephone & Telegraph Co.*, 174 U. S. 761 (1899) 26

Scenic Hudson Preservation Conference v. *FPC*, 354 F. 2d 608 (2nd Cir. 1965), cert. den. 384 U. S. 941 (1966) 28–29

PAGE

Securities and Exchange Commission v. *New England Electric System*, 384 U. S. 176 (1966) 33

Tennessee Electric Power Co. v. *TVA*, 306 U. S. 118 (1939) 11, 31, 32

TVA v. *Kinzer*, 142 F. 2d 833 (6th Cir. 1944) 37, 38

Udall, et al. v. *FPC, et al.*, 385 U. S. 926 (1967) .. 28

Udall v. *Tallmann*, 380 U. S. 1 (1965) 34

United States Ex. Rel. TVA v. *Powelson*, 319 U. S. 266 (1943) 25, 26

United States v. *Twin City Power Co.*, 350 U. S. 222 (1956) 26

United States v. *United States Gypsum Co.*, 333 U. S. 364 (1948) 44

United States v. *Utah Construction & Mining Co.*, 384 U. S. 394 (1966) 41

West Tennessee Power & Light v. *City of Jackson*, 97 F. 2d 979 (6th Cir. 1938) 30

Western Union Telegraph v. *Richmond*, 224 U. S. 160 (1912) 27

Zemel v. *Rusk*, 381 U. S. 1 (1965) 34, 38

State Cases:

Blue Ridge Electric Membership Corp. v. *Duke Power Co.*, N. C., 128 S. E. 2d 405 (1962) 13

Keeble v. *Loudon Utilities*, Tenn., 370 S. W. 2d 531 (1963) 30

Otter Tail Power Company v. *Sioux Valley Empire Electric Association* S. D., 131 N. W. 2d 111 (1964) 13

Pitt & Greene Electric Membership Corp. v. *Carolina Power & Light*, N. C., 136 S. E. 2d 124 (1964) 13

Smith v. *Otter Tail Power Co.*, S. D., 123 N. W. 2d 169 (1963) 13

Wissler v. *Yadkin River Power Co.*, 158 N. C. 465, 74 S. E. 460 (1912) 25

Federal Statutes:

	PAGE
Tennessee Valley Authority Act, 16 U.S.C. § 831(c)	39
Tennessee Valley Authority Act, 16 U.S.C. § 831(j)	14
Tennessee Valley Authority Act, 16 U.S.C. § 831n-4(a)	2, 21
P. L. 89-537; 80 Stat. 346 (1966)	12

State Statutes:

Tenn. Code Ann. § 6-1301 to 1318	30
Tenn. Code Ann. § 6-1501 to 1537	30

Miscellaneous:

105 Cong. Rec. 13052	17–18
FRCP 52(a)	43
H.R. 3460 and H.R. 3461, Report No. 86-3, 86th Cong., 1st Sess., House Committee on Public Works	19, 20
Revenue Bond Financing by TVA, Senate Report No. 470, July 2, 1959	17, 22, 40

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

Nos. 40, 50 and 51

EDWARD J. HARDIN, as Mayor of Tazewell, Tennessee, Et Al., - - - - - *Petitioners,*

v.

KENTUCKY UTILITIES COMPANY, - - *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONERS, HARDIN AND DeBUSK, MAYORS OF TAZEWELL AND NEW TAZEWELL, TENNESSEE.

OPINIONS BELOW.

The Opinion of the Court of Appeals is reported at 375 F. 2d 403 (6th Cir. 1966) (R. 718). The Opinion of the District Court is reported at 237 F. Supp. 502 (E. D. Tenn. N. D. 1964) (R. 302).

JURISDICTION.

The judgment of the Court of Appeals was entered November 15, 1966 (R. 747). No. 40 Petition was filed January 11, 1967 for the Mayors and the towns of Tazewell and New Tazewell; No. 50, February 13, 1967 for Powell Valley Electric Cooperative, hereinafter "PVEC"; No. 51 for TVA, February 13, 1967; and Certiorari was granted March 27, 1967. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

STATUTE INVOLVED.

The pertinent part of the statute involved here appears as Appendix A to this brief. This statute was the 1959 TVA Financing Act, 16 U. S. C. § 831n-4(a). The words of that Act chiefly under scrutiny here forbid TVA from making "contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957."

QUESTIONS PRESENTED.

1. Whether the TVA Financing Act destroys pre-existing rights of the public to choose its power supplier in an area where both a TVA distributor and an investor company were selling power on July 1, 1957.

2. Whether the TVA Financing Act gives Kentucky Utilities Company, hereinafter "KU", an ex-

clusive franchise guaranteeing freedom from competition from a TVA power distributor in an area where there was such competition on July 1, 1957.

3. Whether the TVA Board of Directors is obligated to make legal interpretations from time to time of the TVA Act and to make findings of fact based on those interpretations which, if supported by substantial evidence, have the binding effect of law.

STATEMENT.

This case arises out of a dispute between Kentucky Utilities Company on one side, the Towns of Tazewell and New Tazewell, Tennessee, Powell Valley Electric Cooperative and TVA on the other. The question is whether TVA power may legally be distributed by PVEC and the municipally owned electric systems to people within the Towns.

Prior to the advent of TVA, Dixie Power and Light Company, predecessor to KU, provided electric service to some locations in Claiborne County wherein the towns are located in northeast Tennessee (R. 330). KU held a non-exclusive county franchise giving it the right to occupy county roads along with other utilities (R. 341). It has never held a franchise from the towns. At a later date PVEC obtained a similar non-exclusive county franchise (R. 334, 335).

In 1954 Dixie Power and Light transferred its assets to KU and was dissolved (R. 329).

The problem of competition in the area over electric service was the result of substantial rate differentials between KU on the one hand and the city

systems of Tazewell and New Tazewell and PVEC (all TVA power distributors) on the other (R. 658).

Also there was evidence that the growth of PVEC service was the result of some failure of KU and its predecessor to be aggressive in providing service (R. 657, 658).

Mayor De Busk of New Tazewell stated:

> ". . . my parents and neighbors was trying to obtain electricity because we was—we didn't have no refrigerators, we didn't have no facilities, we even used a Delco plant, and so the Powell Valley was coming down in that area and my Dad had done give a deposit of $5.00 for the power and when KU got the word or heard that they were coming in that area they rushed right at once and took them up.
>
> . . . . . .
>
> "That shows that we wouldn't have grown if we hadn't had TVA power or Powell Valley power, and I think the records show that" (R. 675).

The rate differential resulted in construction of a large majority of new homes incorporating the principle of electric heat where those homes were built on lines of the city system or PVEC (R. 658).

Land values were greatly affected and such construction as was undertaken was largely confined to lots where TVA power was available. There, the interpretation KU placed on the territorial restriction provisions of the 1959 TVA Financing Act is partic-

ularly interesting as revealed in two interrogatories and answers.

KU was asked:

> "Q. 12. Do you contend that the entire boundary of a tract of land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by one of plaintiff's customers, is outside of the 'TVA area' as described in paragraph 10 of your complaint?
>
> A. Yes.
>
> Q. 13. If your answer to interrogatory 12 is in the affirmative, do you concede that the entire boundary of a tract of land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by a customer of Powell Valley Elecric Cooperative, is within the 'TVA service area' as defined in your complaint?
>
> A. No" (R. 40).

The intense feeling of the people was indicated in a poll taken by the mayors which showed the people five to one or better in favor of receiving power from a TVA distributor rather than from KU (R. 672, 673). The manager of PVEC tells of his feeling that he is being forced to help the people, saying:

> "As manager of Powell Valley Electric Cooperative it would have been far easier for me to live with the territorial agreement with KU because I wouldn't have as many problems as I have probably if I lived with this agreement.
>
> Q. Did you feel that whichever way you went you were going to wind up in cour[illegible]

A. Yes, sir.

Q. What lead you to feel that way?

A. Well, from time to time people had in a roundabout way threatened to sue us, and as I said a while ago, our attorney said we might not be in too good a position in this situation.

Q. To refuse service to the public?

A. To refuse to serve these people" (R. 652).

In the midst of the turmoil there was a city election in which the main issue was power and in which the candidates supporting KU's position were defeated and the candidates favoring Powell Valley and the city systems were elected (R. 633).

Also in the struggle one tactic employed by KU was an effort to get cities to grant city franchises (R. 454 and 641). This it did by offering money to the cities. The representative of KU in delivering the checks was indefinite as to what the purpose of the checks was, but the checks had typed on them "in return for perpetual franchise" (R. 369). Paris T. Coffey, President of the Tazewell Chamber of Commerce testified:

"Q. And then I asked him, I said, would you give these checks to us without any strings being attached to them, and he—I don't remember exactly his reply about it. I said, we feel this is for a franchise, and he said, no, this is a dividend or something to that effect that we owe it to you, and I insisted, the fact about, Mr. Smith and I had kind of a strong argument over the check and I said, if we are due it, Mr. Smith, we are due it without strings. If we are not due it, I don't

think you can come over here and buy Tazewell for thirty some hundred dollars. That's the way I feel about it. We may be poor, but still we are independent from that angle.

And so, he left the checks, and, also I'll put it this way, Mr. Smith brought it down to a personal affair, he said, what about your funeral home out there, if somebody wanted to repair something about your funeral home. I said, Mr. Smith, if you will put your power down in competition with your competitor, as I have mine with my competitors, well, we will welcome KU power, and we do. We have nothing against KU, but we do want cheaper power" (R. 641).

Claiborne County, Tennessee, as a seriously depressed area in grave need of economic help (R. 639, *et seq.*; 683). Its condition of need caused many communications to pass between the representatives of the people in Tazewell and New Tazewell, largely through their mayors, in an effort to get KU either to lower the rate or to sell its facilities to the cities' system (R. 671, 685, 686). These efforts were unavailing. The last communication by letter from the mayors to KU went unanswered for a period of five weeks until finally the towns established, pursuant to the Tennessee law, municipal systems and commenced construction of their own distribution lines (R. 686).

The city system was established by resolution of the city councils in October of 1963. The cities employed a contractor to construct facilities to the points of service where service had been demanded. In only one case was there a physical cutover from KU service

to the city service without action on KU's part and this was done by Cecil Hurst, a motel owner. Hurst testified that he put in an application with the city and called KU to tell them to disconnect. After several fruitless attempts to communicate with KU he found the service manager of KU on the road.

> "I thought I'd get out and take after him and tell him, and went up the road about a mile and he turned around and I stopped and talked to him, and as soon as I started talking to him, he run off, and left me, and I had to run him down again and I ran him down in New Tazewell, and I blowed my horn, and he pulled over and stopped, and I told him I would like to discontinue Kentucky Utilities and he said, 'I'm not going to do it. I can't change. I can't take it loose' " (R. 635).

Hurst then tells about his going with the city contractor and obtaining a meter which he, jointly with the contractor, put on his motel physically changing the service from KU to the city service (R. 635, 636).

In other cases when KU was requested to terminate service it did so with its own crew, sometimes in a rather surprising manner. Jerry Brooks, owner of the Brooks Furniture Manufacturing Company of Tazewell, tells how he called KU and a KU man came out and cut power off in the middle of a working day when he had a full crew on without even giving him a chance to shut down his machinery and thus avoid a possibly dangerous situation. In response to a question of KU counsel as to whether the manner of the

cutoff was not reasonable from KU's viewpoint, Brooks comments:

> "The pole which carries the Kentucky Utilities service is not more than 50 feet to the entrance of my office, and since we had been buying power from KU these many years, I think Mr. Pressnell or someone from the utility company, should have at least shown me the courtesy of coming into my office and telling me they were going to cut the service. If they had I would not have objected to it, but I certainly would have gone out into my plant and turned off the motors and taken steps to prevent any damage to the machinery. Fortunately no damage was done" (R. 628, 629).

Shortly after the establishment of service from the system owned by the cities of Tazewell and New Tazewell, KU commenced this action.

One final and important point is necessary to a proper statement of facts herein. This is to recognize that on July 1, 1957 TVA distributors had lines completely surrounding the towns. They were supplying power at many points on all sides of the towns and in the area which the Circuit Court called KU's "corridor" (R. 561). This is graphically portrayed by Exhibit 91, whic his the only map precisely showing all users of TVA power in the area on that date. This map is attached to and made a part of the dissent of Circuit Judge Edwards in this case (R. 745, 552, Sheet 1b Ex. Vol. I). On July 1, 1957 KU was supplying 561 customers in the towns to 28 receiving TVA power. But in the total area of Claiborne County

TVA distributors supplied 3,564 customers to 1,839 for KU. The average KWH sales for June and July of 1957 were 1,015,000 to the TVA consumers compared to 610,000 for KU (R. 84). The foregoing is essential to determination of who was the primary source of power supply in that area on July 1, 1957.

SUMMARY OF ARGUMENT.

The statute herein interpreted forbids TVA from contracting for the sale of power in any manner that would make TVA or its distributors directly or indirectly a source of power supply outside *the area* for which the Corporation or its distributors were the primary source of power supply on July 1, 1967. The area of Claiborne County on that date had 3,564 users of TVA power compared to 1,839 users of KU power.

It is true the towns of Tazewell and New Tazewell on that date had 561 KU customers to 28 users of TVA service. But the towns were small dots in the general area and were ringed around by TVA lines and TVA customer outlets.

Petitioners Hardin and DeBusk and their towns of Tazewell and New Tazewell had been importuned for years to grant KU a franchise but had declined. KU entered a hot city election and was soundly defeated. Yet the Circuit Court holds that the area of the towns was outside an area for which TVA and its distributors were the primary source of power supply on July 1, 1957. This, in practical effect, removes TVA and its distributors from serving people it was serving prior to the cutoff date set up in the Act.

It is our first contention that there is nothing in the 1959 amendment of the TVA Act to warrant such a determination. It is our contention that what the Circuit Court does attempts to overrule the cases of *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938); *Tennessee Electric Power Company* v. *TVA,* 306 U. S. 118 (1939); and *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (D. C. Cir. 1955), cert. den. 350 U. S. 884 (1955), in their holding that power companies have no legal right to be free from government competition. In so doing the Circuit Court strikes down the right of the people to decide on their own source of power supply. By eliminating one of only two possible sources of power supply, the Court has in effect granted exclusive and perpetual city franchises to KU.

It is our contention that in this area where both TVA power and investor company power was being distributed on July 1, 1957, the TVA Financing Act does not destroy the right of the power user to choose his source of supply. This, we submit, remains the prevailing law, unchanged by the statute here litigated. We believe the law gives first concern to the public; not to KU or TVA. We urge that in giving first concern to the public, our interpretation of the Act must prevail.

We also urge upon the Court the conclusion that administrative bodies such as the Board of Directors of TVA must of necessity make frequent interpretation of the acts under which they operate; that when such interpretation is made, it must be given deferential and

serious consideration in the courts. This was not done by the Circuit Court in the instant case.

We further submit that TVA, having made its interpretation of the law, marshalled substantial evidence upon which it based its finding. It found the area herein under consideration was within an area for which TVA was the primary source of power supply on July 1, 1957. We say that this finding is supported by the great weight of evidence—yet it only needed evidence enough so that if it were a jury matter, a court of law would not have been compelled to direct a verdict otherwise. *Consolo v. Federal Maritime Commission*, 383 U. S. 607 (1966).

Finally, we say that since the interpretation and finding of fact were made by TVA, it has submitted numerous reports of its activities to Congress and no question of this interpretation has been raised in Congress. Moreover, Congress has passed a subsequent amendment of the TVA Act in the interim, expanding TVA borrowing authority from $750,000,000 to $1,750,000,000. P. L. 89-537; 80 Stat. 346 (1966). The passage of this amendment by Congress without any question about the interpretation and determination here litigated, clearly implies congressional approval of the action taken by TVA.

ARGUMENT.

I.

The TVA Financing Act Does Not Destroy the Rights of the Public in an Area Where Both a TVA Distributor and an Investor Company Were Selling Power on July 1, 1957.

Perhaps the greatest error of the Circuit Court results from the fact that it treats this controversy as though the public had no interest here at all. The entire rationale of the opinion is as though this were simply a battle between KU on the one hand, TVA and PVEC on the other. Presumably on the date this act became law and on July 1, 1957, the magic date established within that law for making determinations about service areas, the public had some interest which might be consistent or inconsistent with the individual interests of those adversaries. "The public" would of course include public bodies, such as municipal corporations, and it would include the individual power users[1] as well as "the public" in the broad sense meaning everyone.

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[1]An individual power user in an area served by more than one electric supplier usually has been held to have a right to choose his supplier. In *Otter Tail Power Company* v. *Sioux Valley Empire Electric Association*, S. D., 131 N. W. 2d 111 (1964), the court said: "... where two utilities are authorized by law to serve the same rural territory, consumers therein are free to choose and to change their supplier." 131 N. W. 2d at 117. See also *Smith* v. *Otter Tail Power Company*, S. D., 123 N. W. 2d 169 (1963); *Pitt & Greene Electric Membership Corp.* v. *Carolina Power & Light*, N. C., 136 S. E. 2d 124 (1964); *Blue Ridge Electric Membership Corp.* v. *Duke Power Company*, N. C., 128 S. E. 2d 405 (1962).

The fact that the financing act has not a single word to change the pre-existing interests of the public in the TVA area would clearly imply that those interests remain the same as prior to the act. The original TVA act contained numerous statements of concern for the public interest, which statements were not changed by the amendment. A typical statement is contained in the first part of Section 11 of the Act, 16 U. S. C. § 831(j), where it is stated:

> "It is hereby declared to be the policy of the government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the states, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to acquire a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity . . ."

The opinion of the Sixth Circuit, if implemented literally will have the effect of forcing TVA to cut off power to users whom it has been supplying for many years prior to the effective date of the act and prior to July 1, 1957. The Court first says:

"KU does not have an exclusive franchise, and accordingly, has no contractual, statutory or constitutional right to be free from competition. KU's complaint, however, does not ask a decree protecting it from all competition. It asks that TVA and PVA be enjoined from violating the 1959 Act by expanding its sale of power into the Tazewells, cities which are outside of TVA's primary area" 375 F. 2d at 415 (R. 735).

Then the Court continues to say:

". . . TVA asserts that KU has no right to be free of competition, that the municipalities have the right to set up their own electric power plants to compete with plaintiff and therefore, it is no business of KU where these municipal systems obtain their power. But KU does not contend that the Tazewells are forbidden such competition with it, and it does not challenge their source of power except—and this is the big distinction here—that it does claim the right to ask judicial enforcement of a limitation on the source of its competitors' power, which limitation Congress made into law for its benefit" 375 F. 2d at 416 (R. 737).

The foregoing language completely blinks the fact that KU for a long period of time tried to obtain a franchise from the cities even to the point of offering money by checks marked "for perpetual franchise" while denying that was the purpose of the offer. If the Court's opinion is put into effect in its literal meaning, then TVA must get out of the Tazewells regardless of how long it has been there, because the

Tazewells constitute territory outside the area where TVA or its distributors were the primary source of power supply on July 1, 1957, and the act of Congress says that TVA may make no contract for the sale or delivery of power in such an area. Further language of the Court to this effect is as follows:

> "From the evidence in this record, we are convinced that as a matter of undisputed fact the cities of Tazewell and New Tazewell were, on July 1, 1957, a part of and *within* the total area served by KU and in which KU was the primary source of power supply. If so, they were *outside* of the area in which TVA or PVA were such primary source, and the latter were therefore statutorily forbidden from therein making contracts 'for the sale or delivery of power.'" 375 F. 2d 412 (R. 729).

There is absolutely nothing in the act to permit of such construction, namely, that TVA was to be forced out of areas where its power was being sold prior to the enactment of the financing act, and prior to the cutoff date named in that act. The bill itself, of course, in its wording goes on to allow TVA to continue to serve in what is called "the area for which the corporation or its distributors were the primary source of power supply on July 1, 1957," and adds "and such additional areas extending not more than five miles around the periphery of such areas *as may be necessary to care for the growth of the corporation and its distributors within said areas;* . . ." (Emphasis added.)

With regard to what was intended by the Congress, it is stated in the Senate Report, which is the last of the Committee reports on the bill before passage:

> "In summation, the committee believes that H.R. 3460, as amended is satisfactory and equitable insofar as the territorial restrictions is concerned. It will permit desirable minor adjustments on the periphery of the area presently supplied and within that area; prevent service to additional cities with a population in excess of 5,000 or 10,000 if they own their distribution systems; *protect the right of certain communities to choose their power supply;* protect the areas now being served by private utilities; preserve existing contracts, interchange arrangements, and power supply to defense installations; and reduce the possibility of litigation and confusion arising from ambiguous terms. It further believes that the TVA Board would use extreme caution in extension of service as authorized and would not encroach on other communities now served by private enterprise." (Emphasis added.) *Revenue Bond Financing by TVA.* Senate Report No. 470, July 2, 1959 p. 9.

Senator John Sherman Cooper incorporated a statement in the Congressional Record which emphasized the point as follows:

> "Further, the right of choice of small communities which are near the periphery of TVA ought to be considered. We are not concerned solely by the interests of TVA and private utilities. The small, self-governing communities in the TVA area should have the right to make a

choice of whether they will receive power from the Tennessee Valley Authority or from a private utility." 105 Cong. Rec. 13052.

Judge Taylor of the Federal District Court, Eastern District of Tennessee, recognized this in his opinion and states that the Senator "apparently had no question about its authority under the Amendment to serve municipalities inside the periphery." 237 F. Supp. 502, at 511 (R. 317).

In its failure to concern itself with the interests of the public, as that interest may be distinct from the interest of the power suppliers, we submit one substantial cause of the Circuit Court's error was that it misread the legislative history of the Act. The Court comments at some length on the Vinson Amendment which became a part of the bill as it passed the House, but was eliminated prior to final passage. The opinion states:

> "During the hearings before the House Public Works Committee, Rep. Vinson proposed an amendment to limit TVA solely to its July 1, 1957, service area, and with some minor amendments to make provision for peripheral adjustment and a slight change of language, this ultimately became a part of the Act.
>
> "In discussing the intent of his amendment, Rep. Vinson referred to the existence of various accommodations which had been reached dividing and delineating the areas of service between the Alabama Power Corporation and TVA, between the Georgia Power Co. and TVA, and indeed in our own case between KU and PVA. See Hear-

> ings, Senate Committee on Public Works, 86th Cong., 1st Sess., S. 931 and H.R. 3460, pp. 39-51. 220 (1959). Rep. Vinson stated that his amendment 'writes into the law the "gentlemen's agreement." Hearings, House Committee on Public Works, 86th Cong., 1st Sess., H.R. 3460, p. 111 (1959).' " 375 F. 2d at 411; (R. 727, 728).

The Court then talks about the Senate version of H. R. 3460 which removed the language of the Vinson Amendment and replaced it with substantially different language prior to final passage. However, the Court incorrectly stated the language of the Vinson Amendment "ultimately became a part of the Act" and reasons from that position. The opinion further says:

> "In the Senate report (No. 470, 86th Cong., 1st Sess., 1959) on the final version of H.R. 3460, the Senate noted:
>
> " 'Although there has been no *statutory* boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this area was satisfactory and no area limitation was required. *Others believed, however, that the stabilization area should be defined and limited by law.*' U. S. Code Cong. and Adm. News, 86th Cong., 1st Sess. 1959, p. 2007. (Emphasis Supplied.)
>
> "The 'others' were those who supported the Vinson Amendment which became a part of the bill." 375 F. 2d at 412 (R. 728, 729).

It is quite clear that Representative Vinson when he tacked on the Vinson Amendment was trying to help the Georgia Power Company in its efforts to restrict TVA. Representative Vinson stated his amendment would protect TVA consumers, but it was evident from his own statement that his real concern was for

> "the stockholders of the Georgia Power Company, the employees of the Georgia Power Company as well as thousands upon thousands of individuals who have investments in private utility companies." 86th Cong., 1st Sess., on H.R. 3460 and H.R. 3461, Report No. 86-3, p. 110 (1959).

The language Representative Vinson inserted in the bill when it was before the House was as follows:

> "Unless otherwise specifically authorized by act of Congress existing and subsequently built, leased or acquired power facilities of the Corporation shall not be used for the sale or delivery of power for use outside the service area of the Corporation as it existed on July 1, 1957, except, when economically feasible for exchange-power arrangements with other utility systems with which the Corporation had such arrangements on said date." *Id.* at p. 111.

The language of the Act as passed is:

> "Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply *outside the area for which the*

Corporation or its distributors were the primary source of power supply on July 1, 1957. . . ." (Emphasis added.) 16 U. S. C. § 831n-4.

We suggest that the language of the Act as passed which restricts TVA, with exceptions, to the areas for which it or its distributors were the *primary* source of power supply on July 1, 1957, implies that in addition to the primary supplier of an area there might be some other supplier present in the same area as of that date. This language clearly implies that if there were more than one power supplier in an area, this would not be inside the main periphery of TVA unless TVA and its distributors were the *primary* source there on that date.

It is also noteworthy that the language speaks of power supply in "the area." It does not speak of "the municipality" as the Court has interpreted it in its opinion. This latter distinction is rendered more persuasive by the following language that in the area beyond the *primary* area, TVA was not to supply power "in a municipality receiving electric service from another source on or after July 1, 1957. . . ." So the Congress concerned itself only with "the area," except where TVA got out beyond the line where it was the primary source of power supply on June 1, 1957. Then it become concerned with something other than "the area." It became concerned with boundaries of municipalities. The words "the area" certainly imply something larger than the tiny bits of geography represented by the two small towns of Tazewell and New Tazewell.

In the final Committee Hearings, the report submitted by Senator Robert Kerr, Committee on Public Works, states:

> "The committee believed it desirable to authorize minor adjustments in area, to permit elasticity and adjustment in an attempt to eliminate certain problems, and to obviate the necessity of coming back to Congress for each slight adjustment or change, as by extension of lines by a distributor of TVA power.
>
> . . . . . .
>
> "The committee was of the opinion that the language of the House bill would invite litigation any time that a distributor of TVA power undertook service to a new customer, even within the general area it was already serving. Even if such litigation were eventually resolved in an equitable manner, its existence could raise serious problems in the marketing of the bonds by TVA." *Revenue Bond Financing by TVA,* Senate Report No. 470, July 2, 1959, pp. 8, 9.

Individual views of the opponents of the final language of the bill, Senators Winston L. Prouty and Jennings Randolph, are contained in this same report.

Senator Prouty stated his apprehensions about the language as follows:

> "It is the committee's intent, insofar as the territorial restrictions in the bill are concerned, to permit desirable minor adjustments on the periphery of the area presently supplied by TVA power to take care of natural growth within that area.

> "However, I believe that in its efforts to protect the rights of present customers of TVA the committee has approved language which would permit a city or any other present customer of TVA to resell TVA power to innumerable communities, whatever their size, and throughout other areas, however large.
>
> "In my judgment, the language in the bill as presently written permits the Tennessee Valley Authority to make contracts for the sale of power with States, counties, municipalities, corporations, partnerships, and individuals with which it had contracts on July 1, 1957, and these contracts would not be subject to a territorial limitation of any kind." *Id.* at 52.

Senator Randolph also voiced fears about the language but went on to say:

> "Of course, consistent with this view TVA should be encouraged to serve any 'islands' which now exist within its geographical operating area as it existed on July 1, 1957." *Id.* at 54

Thus we see two opponents of TVA interpreting the language of the Act entirely differently from the way it was interpreted by the Court of Appeals. This we should qualify to the extent that the Court of Appeals says KU service in the area does not constitute an island but is a peninsula. The question as to whether it was an island or a peninsula is best shown by the map, Exhibit 91, filed with Judge Edwards' dissent (R. 745, sheet 1b, Ex. Vol. I) which specifically locates every point of service of TVA

power in Claiborne County, Tennessee as of July 1, 1957.

The points of service in and around the towns as Exhibit 91 clearly shows are so numerous as to make it impossible to locate any corridor. Here also it is to be remembered not only does PVEC have a transmission line crossing the KU transmission line coming into Tazewell and New Tazewell but it also owns the substation from which all of KU's customers, all the customers of PVEC, and all customers of the city systems in the general area receive power (R. 459). The fact that KU owns a transmission line should be equated by PVEC's owning the substation from which all services is rendered in the area.

But the main point of importance, we think, is the fact of the myriad of service outlets of TVA power which existed as of July 1, 1957. The map also filed with the dissenting opinion (R. 746, 771) in the Circuit Court, exhibit No. 36, which purports to show a corridor of KU service does not show any specific points of service of KU and/or TVA distributors. Moreover, it was prepared in 1952, five years prior to the date picked by Congress as the cutoff date to determine the general boundaries of TVA's primary service area. We submit the Court should judicially note the fact that the five years from 1952 to 1957 were years of enormous growth in the electric industry generally and in the Tennessee Valley, particularly. Therefore the map KU offered to show it served a corridor lacks relevance in that it is not tied to the magic date of the TVA Financing Act itself.

In most of the big power battles that have reached the Supreme Court, this Court has sought to interpret the law from the interest of the public as a whole. In the case of *United States Ex. Rel. T.V.A.* v. *Powelson,* 319 U. S. 266 (1943) this Court addressed itself to the question of the valuation of property owned by a private power company, later assigned to an individual, which was under condemnation by TVA. This property constituted an appropriate site for the production of hydroelectric power. The condemnee was seeking to assert that the profits attributable to its anticipated production of hydro power should be considered as evidence of the value of the land taken. The Court said:

> "The law of eminent domain is fashioned out of conflict between the people's interest in public projects and the principal of indemnity to the landowner." 319 U. S. at 280.

In a footnote on the same page, the Court approves a quote from a state case, *Wissler* v. *Yadkin River Power Co.,* 158 N. C. 465, 74 S. E. 460 (1912), where the Supreme Court of North Carolina said:

> "This power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large."

So has it always been with public service corporations endowed with the power of eminent domain. The theory behind this mighty power is that these corpora-

tions' first concern must be the public interest, rather than investor-stockholder interest.

The *Powelson* case has been followed in a number of other cases, two of which are *Kimball Laundry Co.* v. *United States,* 338 U. S. 1 (1949), and *United States* v. *Twin City Power Co.,* 350 U. S. 222 (1956). The latter case was another case where the United States was condemning land adjoining the Savannah River owned by investor power companies which had acquired it for the development of hydro power. The Court, citing the *Powelson* case, rejected the companies' suggestion that the property taken be valued by its prospective use for hydro electric power purposes, saying:

> "To require the United States to pay for this water-power value would be to create private claims in the public domain." 350 U. S. at 228.

A further sampling of the very broad general legal principal that public service corporations must concern themselves with the public interest and that cities constitute part of that interest, is shown in the case of *Richmond* v. *Southern Bell Telephone and Telegraph Co.*, 174 U. S. 761 (1899). Here the Telephone Company was seeking assistance of an act of Congress of 1866 which it claimed gave it a right to occupy the streets of the city of Richmond against the will of the local authorities of that city. The act did give telegraph companies the right to use post roads. The Court denied the telephone company's contention and held the act was not intended to confer upon the com-

pany any special rights in the streets of the city, saying:

> ". . . questions that will occur to everyone indicate the confusion that may arise if the act of Congress relating only to telegraph companies be so construed as to subject to national control the use and occupancy of the streets of cities and towns by telephone companies . . . But we are unwilling to rest the construction of an important act of Congress upon implication merely, particularly if that construction might tend to narrow the full control always exercised by the local authorities of the states over streets and alleys within their respective jurisdictions." 174 U. S. at 777.

That case also has been followed in a number of cases, including the case of *Western Union Telegraph* v. *Richmond,* 224 U. S. 160 (1912) where the Court at page 169 says:

> "The inability of the state to prohibit the appellant from getting a foothold within its territory, both because of the statute and of its carrying on all commerce among the states, gives the appellant no right to use the soil of the streets, even though post roads, as against private owners, or as against the city or state, where it owns the land."

Though these are not recent decisions it seems to us that the same principle applies in the case at bar, namely: That where KU has sought and failed to obtain a franchise from the cities of Tazewell and New

Tazewell, it is wrong to interpret the TVA financing act as giving them the franchise which the people and the towns refused. To say KU is the only legal supplier of power within the towns, we submit, is in practical effect to grant just such a franchise.

Concluding this point of how the Supreme Court and courts generally have considered the business of electric power supply in relation to the interest of the public as a whole, we wish to cite two more cases which we submit are appropriate for consideration. The first is the recent "High Mountain Sheep" decision of this Court, *Udall, et al.* v. *FPC, et al.*, 385 U. S. 926 (1967). In this case, as this Court recalls, the question was whether or not the Federal Power Commission had given adequate consideration to the public interest in granting Pacific Northwest Power Company a license to construct a hydroelectric power project at High Mountain Sheep on the Snake River. The Court remanded the matter to the Commission for further consideration, holding that it had failed adequately to concern itself with certain matters of interest to the public as a whole, saying:

> "The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest." 385 U. S. at ——.

The other case was decided by the Court of Appeals for the Second Circuit, *Scenic Hudson Preservation*

Conference v. *FPC,* 354 F. 2d 608 (2nd Cir. 1965) cert. den. 384 U. S. 941 (1966). In this case FPC granted a license to construct a pump storage hydro-electric project to Consolidated Edison Company. The project was to be located on the west side of the Hudson River at Storm King Mountain in Cornwall, New York. The Second Circuit remanded the matter to the Commission, saying that the Commission had not given adequate consideration to the interest of the public as a whole. The Court aptly comments:

> "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." 354 F. 2d at 620.

In the case at bar the cities feel strongly that the real error of the Sixth Circuit here was that it saw itself acting "as an umpire blandly calling balls and strikes for" the adversary power suppliers, forgetting that "the right of the public must receive active and affirmative protection." The District Court appropriately gave concern for that right. The Circuit Court did not.

II.

The TVA Financing Act Gives KU No Right To Be Free of Competition From TVA Power Distributors in Areas Where There Was Such Competition on July 1, 1957.

As has been mentioned, the Circuit Court seeks to emphasize that KU does not claim protection from "all competition." And yet the judgment of the Court terminates one of only two sources which have offered power supply to the area for a period of many years. These two sources are also, as a practical matter, the only two possible sources of wholesale power supply available for distribution in the area. Thus, the effect of the Court's decision gives KU an exclusive monopoly franchise which it has sought and been unable to obtain from the people. The Tennessee statutes specifically give the towns the right to acquire their own electric systems and to supply power to their citizens in competition with KU. Tenn. Code Ann. §§ 6-1501 to 1537 (1955) (Municipal Electric Plant Law of 1935); Tenn. Code Ann. §§ 6-1301 to 1318 (1955) (Revenue Bond Law.) This authority has been sustained in the courts in the cases of *Keeble* v. *Loudon Utilities,* Tenn., 370 S. W. 2d 531 (1963); *Knoxville Water Co.* v. *Knoxville,* 200 U. S. 22 (1906); *West Tennessee Power & Light* v. *City of Jackson,* 97 F. 2d 979 (6th Cir. 1938).

The effect of the Court's decision is to kill the cities' systems as distributors and to hold that the TVA Financing Act overrides the acts of the Tennessee legislature and withdraws the rights which the

Tennessee law purports to afford. This is certainly a broad departure from the development of law up to this point, for the right to TVA to afford competition to the investor companies has hitherto been well established in the following cases cited in the Opinion of the 6th Circuit, *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938); *Tennessee Electric Power Company* v. *TVA,* 306 U. S. 118 (1939); and *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (D. C. Cir. 1955), cert. den. 350 U. S. 884 (1955).

Very recent sanction for the philosophy contained in the above cases is to be found in *REA* v. *Central Louisiana Electric Co. Inc.,* 354 F. 2d 859 (5th Cir. 1966) cert. den. 385 U. S. 815 (1966). In this case three power companies had obtained a district court injunction to stop a loan by REA to an electric cooperative. The Circuit Court in reversing the District Court held the power companies could not challenge the loan and, citing the cases above cited, the Court commented:

> "Appellees here are not parties to the loan. Appellees are not being *granted* or *denied* a loan in violation of the law or in violation of regulations having the force of law. They are not having any penalty or forfeiture directly assessed against them. They come into court to halt a loan to a third party, contending that the loan is being illegally made and, in the future, will cause illegal consequences. Their only standing for this is their natural opposition to having territory invaded which heretofore has been de facto their sole domain but in which they have no exclusive right." 354 F. 2d at 865.

A still later case is *Northern States Power Co.* v. *REA,* 373 F. 2d 686 (8th Cir. 1967) cert. den. 387 U. S. 945 (1967). Here the Eighth Circuit Court likewise dissolved an injunction against the Rural Electrification Administration, which injunction had been obtained by power companies to stop an REA loan. Citing the same three cases, the Court said:

> ". . . the interest of the economic competitor is not sufficient standing to challenge the authority or discretion of the Administrator to make loans. . . . Nor did passage of the Administrative Procedure Act create legal rights which otherwise did not exist." 373 F. 2d at 692.

In this case the power companies claimed special standing to sue, citing our case at bar which had then just been decided by the 6th Circuit. The 8th Circuit rejected the contention, again citing *Tennessee Power Co.* v. *TVA,* 306 U. S. 118 (1939).

In the *Northern States* case the power companies argued that the Administrator of REA had failed to perform a duty owed them pursuant to certain regulations which the Administrator had promulgated. The Court in rejecting the contention commented:

> "If anyone is the beneficiary of the regulation, it is the rural consumer of cheap but efficient electrical energy. The intent of the regulation is to assure the borrower, not the power supplier, 'the most advantageous power supply arrangement.'

". . . In administrating the REA program 'freedom from competition' is not a legitimate end of the legislation or regulations promulgated thereunder." 373 F. 2d at 696.

Thus, we submit, have the courts sustained the principle that private power companies have no inherent right to be free of government competition. And in areas where both TVA distributed power and investor-company power was being sold on July 1, 1957, Congress has not changed that principle by enactment of the statute herein litigated.

III.

The TVA Board Has an Obligation to Make Legal Interpretations of the TVA Act, and to Make Findings of Fact Based Upon Those Interpretations Which, if Supported by Substantial Evidence, Have the Binding Effect of Law.

Administrative agencies of necessity must daily make interpretations of the basic law under which such agencies operate. In *Securities and Exchange Commission* v. *New England Electric System,* 384 U. S. 176 (1966) the Court concerned itself with an interpretation made by the Securities and Exchange Commission of a portion of the Public Utility Holding Company Act. The interpretation made by the Commission had been upset by the Court of Appeals, but this Court reversed, saying:

"This is a matter for Commission *expertise* on the total competitive situation, not merely on a prediction whether, for example, a gas company

in a holding company system may make more for investors than a gas company converted into an independent regime." 384 U. S. at 185.

Similarly, this Court in the case of *Federal Trade Commission* v. *Borden Co.*, 383 U. S. 637 (1966) was concerned with an interpretation made by the Federal Trade Commission of Section 2 of the Clayton Act. The Court of Appeals for the Fifth Circuit set aside the order of the Commission because it disagreed with the Commission's interpretation of the words of "like grade and quality." This Court reversed in a clear-cut holding that the Commission's interpretation of the Act was the proper one, saying the "views of the agency are entitled to respect . . . and represent a more reasonable construction of the statute than that offered by the Court of Appeals." 383 U. S. at 640.

Other recent cases where this Court has given great weight to the interpretation placed on an act by those responsible to administer it are: *Atlantic Refining Company* v. *Federal Trade Commission*, 381 U. S. 357 (1965) where the Federal Trade Commission interpreted the Federal Trade Commission Act; *Zemel* v. *Rusk*, 381 U. S. 1 (1965) where the Secretary of State interpreted the Passport Act of 1926 and the Immigration and Nationality Act of 1952; *Federal Power Commission* v. *Union Electric Company*, 381 U. S. 90 (1965) where the FPC interpreted § 23(b) of the Federal Power Act; *Udall* v. *Tallman*, 380 U. S. 1 (1965) where the Secretary of Interior interpreted a presidential executive order; and *Massachusetts Trustees* v. *United States*, 377 U. S. 235 (1964) where

the Maritime Commission interpreted the Merchant Ship Sales Act of 1946.

Despite the reasonable principle of law according respect to the expertise of administrative agencies interpreting the acts under which they operate, the opinion of the Court of Appeals in the case at bar flatly questions whether the Board of Directors of TVA has any responsibility to make such a determination as was made by the Board here.

The Court said:

> ". . . TVA argues, the 1959 Act must be read as committing to its board of directors authority to determine 'the area' in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's board such authority." 375 F. 2d at 412 (R. 729).

It was stated many times by the Committee that the final language of the Act was left to some degree imprecise respecting the area within which TVA's power might be distributed. This was deliberate, as the Committee said, because it believed it "desirable to authorize minor adjustments." This being so it is extremely difficult to rationalize, as the majority of the 6th Circuit does, to the point of the above quoted language.

The authority of the TVA Board to make by-laws, regulations, findings and determinations in the administration of its affairs under the Act has always been sustained. One of the early cases on the point was *Morgan* v. *Tennessee Valley Authority,* 115 F. 2d 990

(6th Cir. 1940) cert. den. 312 U. S. 701 (1941). This case was a determination of the power of the President to remove a director from the TVA board, the President having dismissed Arthur E. Morgan. Morgan contended that the President had no such right to remove a member of the board during the term for which he was appointed. The Court explained the position of the TVA Board as follows:

> "Many of these activities, prior to the setting up of the T.V.A. have rested with the several divisions of the executive branch of the government. True, it is, that in executing these administrative functions, the Board of Directors is obligated to enact by-laws, which is a legislative function, and to make decisions, which is an exercise of function judicial in character. In this respect its duties are, in nowise, different, except perhaps in degree, from the duties of any other administrative officers or agencies or the duties of any other Board of Directors, either private or public. Whatever their character, they are but incidential to the carrying out of a great administrative project. The board does not sit in judgment upon private controversies, between private citizens and the government, and there is no judicial review of its decisions except as it may sue or be sued as may other corporations. It is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions—it is predominantly an administrative arm of the executive department." 115 F. 2d at 994.

This has essentially described the position of the TVA Board for more than a quarter of a century. But one other very important point here to be considered is the fact that TVA does have a responsibility under the Act to make annual reports to Congress. After these reports are made it is appropriate for Congress in maintaining its surveillance over the entire operation to question any administrative decisions it thinks proper. It is noteworthy that in August of 1966 the 89th Congress substantially amended the TVA Act. This amending act extends the borrowing authority of TVA from $750,000,000 to $1,750,000,000. Neither in the reports made by TVA to the Congress nor in Congress's 1966 amendment of the TVA Act has any question been raised about the administrative determination herein held invalid by the 6th Circuit. Had Congress felt TVA had committed substantial violation of the 1959 amendment, surely it would have raised questions.

In the case of *TVA* v. *Kinzer,* 142 F. 2d 833 (6th Cir. 1944), the Court ruled upon a determination made by TVA's Board relative to the establishment of a retirement system for its employees. The Court said:

> ". . . the issues are: whether § 3 required regulations; whether the rules and regulations here in question are reasonably adapted to the administration of the act; and whether such regulations have received the legislative ratification that gives them the effect of law. If these propositions are answered affirmatively, the appellant must prevail." 142 F. 2d at 835.

The Court in the *Kinzer* case held that affirmative answers must be given to the questions and it said that continuing appropriations by Congress manifested congressional approval of administrative determinations made up to the time of the appropriation. The holding in the *Kinzer* case, we submit, is most important for the light it throws on the instant case. The Court there said:

> "The voting of such appropriations, in the face of the construction placed upon the Act by the Authority, has an effect similar to that resulting from the reenactment of a statute, the provision of which had, theretofore, been interpreted by regulations: they are deemed to have received Legislative ratification and thereby, to have become embedded in the law; and are to be given the same force and effect as the statute itself." 142 F. 2d 837.

The Supreme Court in the previously cited case of *Zemel* v. *Rusk*, 381 U. S. 1 (1965) held that subsequent legislation on a subject, which does not change previous administrative interpretations, provides support for the correctness of those interpretations.

In our case, applying the rule of the *Kinzer* and *Rusk* cases, we note that TVA made five separate annual reports to the Congress since the administrative determination was made by the TVA Board on February 4, 1960 and prior to the adjudication of this case in the Court of Appeals. Also in this period of time Congress has amended the TVA Act to authorize

TVA to raise a billion additional dollars. Clearly these factors establish Congress' tactit approval of the Board's administrative action in the meantime and thus that action by way of its interpretation on territory has become "embedded in the law" and is to be given the same force and effect as the statute itself.

The TVA Act gives the Board power to "adopt, amend and repeal by-laws" and to exercise "such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation." 16 U. S. C. § 831(c). The Senate Committee clearly recognized this power and in putting together the final language of the 1959 amendment to the Act, that Committee commented:

> "The committee believes that the TVA Board would not be reckless in utilizing the authority to provide additional service, which actually amounts to less than 1 mile around the periphery of the present area in which TVA power is used, and would properly use such authority to supply isolated communities and contiguous areas, extension into rural areas and expanded municipal areas, and minor necessary adjustments around the periphery and within the area in which power is now supplied.
>
> "H. R. 3460, with the amendments proposed by the committee, does not change the basic administrative premise of the TVA Act. The TVA Board will continue to be held fully responsible by the Congress for the results of its operations, and it will have corresponding administrative authority in the discharge of this responsibility. The ac-

tions of the Board will be subject to annual review by the Congress." *Revenue Bond Financing by TVA,* Senate Report No. 470, July 2, 1959, p. 7.

Extending then upon the thought that administrative agencies are of necessity put to the task of making almost daily interpretations of their own statutes, we submit that Congress has, in accepting annual reports of TVA and in passing a subsequent amendment to the TVA Act, implicitly approved the determination herein made by the TVA Board.

This brings us to the fact finding obligation of TVA. The TVA Board did interpret its own law and it marshalled a number of facts before making the finding objected to by KU. One of the important facts was a map of Claiborne County, Tennessee, which appears in the record as Exhibit 91 (R. 745, Sheet 1b, Ex. Vol. I). This map is the only map which shows the customers and lines of distributors of TVA power as of July 1, 1957. It shows that the towns were ringed around by purchasers of TVA power.

It was also a fact considered by the Board that there were numerous points of TVA power supply inside the towns on that date, although as has been stated, there were not nearly so many TVA customers in the towns on July 1, 1957 as there were KU customers, the comparison being 561 of KU to 28 of TVA. The fact that there were only 589 customers in all does give some idea of what small dots on the map the towns actually are. This we urge should be considered in relation to the words of the Act saying that the test is

a test of the "area" for which TVA and its distributors were the primary source of power supply. Based upon its interpretation of what "area" meant, the Board found that all of Claiborne County was within TVA's primary service area.

It has been repeatedly held that findings of fact of administrative agencies supported by "substantial evidence" must be sustained. In the case of *United States* v. *Utah Construction & Mining Co.;* 384 U. S. 394 (1966) the court was concerned with a dispute between a construction company and the Atomic Energy Commission. The dispute had been adjudicated by the Advisory Board of Contract Appeals. The Board's decision was appealed to the Court of Claims which proceeded to adjudicate, *de novo*, certain issues. On certiorari to the Supreme Court the Court of Claims was reversed because of its failure to give finality to the factual findings of the Board. The court said there was neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties. The situation was admittedly a different one from the case at bar but it does bear some reasonable analogy.

Furthermore, in the case of *Consolo v. Federal Maritime Commission,* 383 U. S. 607 (1966) the Supreme Court considered on certiorari a decision of the District of Columbia Circuit. The Circuit Court had upset a finding by the Federal Maritime Commission. This Court held that an improper standard of review was used when the Court of Appeals adjudicated the matter on a basis of determination that sub-

stantial evidence supported a conclusion contrary to that reached by the Commission. This Court held such a standard not consistent with that provided by the administrative procedure act. The Supreme Court, approving a previous definition, said substantial evidence was "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." The court further said: "this is something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." 383 U. S. at 619, 620.

In a yet more recent case, *Illinois Central Railroad Co.* v. *Norfolk & Western Railroad Co.* —— U. S. —— 17 L. Ed. 2d 162 (1966), this court again has so defined "substantial evidence." There action by the Interstate Commerce Commission had been overturned by a three judge United States District Court. On direct appeal the Supreme Court reversed, saying that substantial evidence was enough evidence to justify a refusal to direct a verdict.

The Court of Appeals in its opinion is unable to state definitely whether the judgment of the District Court was an independent finding of fact or is simply an order sustaining the resolution of the TVA Board. The Court of Appeals says:

> "The District Judge arrived at his decision primarily upon acceptance as having been made

in good faith and on substantial evidence, the resolution of the TVA Board of Directors, made on the eve of trial, that the Tazewells were within the TVA area. If such acceptance of the Board's resolution amounts to finding of fact, we consider that it was clearly erroneous." 375 F. 2d at 412 (R. 729).

It also states:

> "We do not consider that the District Judge's recitation that:
>
> > "'KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps show that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Taxewell.'
>
> was a finding of fact that the Tazewells were 'islands.'" *Id.* at 413 (R. 732).

If the Circuit Court is correct in its inference that the handling of the case by the District Court amounted to an affirmation of the finding by the TVA Board, then that finding is entitled to stronger presumption of support than if it were merely a finding of fact by the District Judge. FRCP 52(a) says in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Under this rule perhaps the leading case is the case of *United States* v. *United States Gypsum Company,* 333 U. S. 364 (1948). Mr. Justice Reed, speaking for the Court in this case gives the reason for the rule and extent of its applicability as follows:

> "That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. *Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by adminisrative agencies* or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis added.) 333 U. S. at 394, 395.

In the italicized portion of the above quote the Court by footnote cites the case of *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726 (1945). In the *Corn Products* case the Court

sustains a finding of the Federal Trade Commission, saying :

> "The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." 324 U. S. at 739.

Thus we submit that if the 6th Circuit can by a simple statement, in face of undenied facts and documents, overturn a District Court which in turn sustained the finding of an administrative body, this then virtually destroys any rule or presumption of correctness of the original finding. It leaves the question as wide open to redetermination as if no administrative determination at all had been made in the first instance.

We strongly urge upon the Court that it would be impossible to administer TVA without the TVA Board making certain findings which in some instances requires an initial interpretation of the TVA Act. We further submit that where those findings are based upon substantial evidence they must be sustained by the District Court as the District Judge here stated in his opinion. Finally, since the 6th Circuit felt the discussion eminated originally and was bottomed upon the administrative determination, that determination is entitled to a greater presumption of correctness than had it been a completely independent finding *de novo* by the District Court.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

APPENDIX

APPENDIX A

PERTINENT SUB-SECTION OF TVA 1959 FINANCING ACT.

(As Amended by PL 89-537—1966)
16 U.S.C. § 831n-4

Bonds For Financing Power Program—Authorization; Amount; Use of Proceeds; Restriction on Contracts For Sale or Delivery of Power; Exchange Power Arrangements; Payment of Principal and Interest; Bond Contracts.

(a) The Corporation is authorized to issue and sell bonds, notes, and other evidences of indebtedness (hereinafter collectively referred to as "bonds") in an amount not exceeding $1,750,000,000 outstanding at any one time to assist in financing its power program and to refund such bonds. The Corporation may, in performing functions authorized by this chapter, use the proceeds of such bonds for the construction, acquisition, enlargement, improvement, or replacement of any plant or other facility used or to be used for the generation or transmission of electric power (including the portion of any multiple-purpose structure used or to be used for power generation); as may be required in connection with the lease, lease-purchase, or any contract for the power output of any such plant or other facility; and for other purposes incidental thereto. Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of

power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area; Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957; And provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton Tennessee; or agencies thereof; or

from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association: Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists. Nothing in this chapter shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same general area where TVA power is supplied to obtain TVA power.

The principal of and interest on said bonds shall be payable solely from the Corporation's net power proceeds as hereinafter defined. Net power proceeds are defined for purposes of this section as the remainder of the Corporation's gross power revenues after deducting the costs of operating, maintaining, and administering its power properties (including costs applicable to that portion of its multiple-purpose properties allocated to power) and payments to States and counties in lieu of taxes but before deducting depreciation accruals or other charges representing the amortization of capital expenditures, plus the net proceeds of the sale or other disposition of any power facility or interest therein, and shall include reserve or other funds created from such sources. Notwithstanding the provisions of section 831y of this title or any other provision of law, the Corporation may pledge and use its net power proceeds for payment of the principal of and interest on said bonds, for purchase or redemption thereof, and for other purposes incidental thereto, including creation of reserve funds and other funds which may be similarly pledged and used, to such extent and in such manner as it may deem necessary or desirable. The Corporation is

authorized to enter into binding covenants with the holders of said bonds—and with the trustee, if any—under any indenture, resolution, or other agreement entered into in connection with the issuance thereof (any such agreement being hereinafter referred to as a "bond contract") with respect to the establishment of reserve funds and other funds, adequacy of charges for supply of power, application and use of net power proceeds, stipulations concerning the subsequent issuance of bonds or the execution of leases or lease-purchase agreements relating to power properties, and such other matters, not inconsistent with this chapter, as the Corporation may deem necessary or desirable to enhance the marketability of said bonds. The issuance and sale of bonds by the Corporation and the expenditure of bond proceeds for the purposes specified herein, including the addition of generating units to existing power-producing projects and the construction of additional power-producing projects, shall not be subject to the requirements or limitations of any other law.